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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1982

WASHINGTON STATE CHARTERBOAT ASSOCIATION,

PETITIONER,

VS.

HOH INDIAN TRIBE;
QUINAULT INDIAN NATION;
QUILEUTE INDIAN TRIBE;
MALCOLM BALDRIGE, SECRETARY OF COMMERCE;
AND
STATE OF WASHINGTON,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Washington State Charterboat Association satisfied the requirements of Rule 24(a) of the Federal Rules of Civil Procedure with respect to its motion to intervene in the case below?

2. Whether an application for intervention which meets the requirements of Rule 24(a) of the Federal Rules of Civil Procedure can be denied based on a court's view of the merits of the legal position to be offered by the party seeking intervention?

PARTIES

The parties to the proceeding in the Court of Appeals for the Ninth Circuit, whose order denying intervention is sought to be reviewed are the following:

Hoh Indian Tribe,
Quinault Indian Nation,
and Quileute Indian Tribe
(plaintiffs-appellees);

Malcolm Baldrige, Secretary of Commerce (defendant);

State of Washington
(intervenor-defendant);

Washington State Charterboat Association (applicant in intervention-appellant).

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OPINION BELOW

The memorandum opinion delivered by the Court of Appeals for the Ninth Circuit in the case below was not published. A copy of that opinion is attached at page 1 of the Appendix hereto.

JURISDICTION

The jurisdiction of this Court is to review the order denying intervention entered March 15, 1982 by the Court of Appeals for the Ninth Circuit, rehearing denied May 5, 1982, invoked under 28 U.S.C. 1254(a).

RULE INVOLVED IN CASE

Rule 24(a) of the Federal Rules of Civil Procedure states as follows:

> Rule 24. INTERVENTION.
>
> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an uncon-

ditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

This petition seeks review of a decision to deny intervention in the case below to the petitioner, Washington State Charterboat Association[1] ("Association"),

[1]The petitioner is an association made up of approximately 350 members who own and operate ocean charter vessels engaged in the recreational salmon fishing industry in the coastal waters of the state of Washington. Because the Association's vessels provide the primary means of access for sports fishermen to the ocean salmon fisheries, the ocean sports fishery in the state of Washington is largely dependent upon the continued viability of the charterboat industry in Washington. The social and economic fabric of several coastal communities

despite the fact that the petitioner unquestionably met the legal requirements for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure. While the trial court provided no explanation whatsoever for its ruling, the denial of intervention was upheld by a panel of the Ninth Circuit Court of Appeals based on its view of the merits of petitioner's legal arguments. This decision was reached despite the facts that the Association, having been denied intervention, was never given an opportunity to fully presents its position on the merits of the controversy, and that the relief requested by the plaintiff tribes[2] would have had a drastic and direct economic and social

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is also dependent upon this industry.

[2]The plaintiff tribes are the Hoh, the Quileute, and the Quinault. As established in U.S. v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied 423 U.S. 1086 (1976), these tribes have largely coterminous "usual and accustomed fishing grounds" on the various rivers and streams of the north Washington coastal region.

effect on the Association and its members. Furthermore, the principles of law established in the case below will continue to determine the harvest limitations imposed on the Association by regulation.

The case below arises out of a controversy regarding federal regulation of the ocean salmon fishery undertaken pursuant to the Magnuson Fisheries Conservation and Management Act (FCMA), 16 U.S.C. §1801 et seq., enacted by Congress in 1977. This Act provides for the management and regulation of the ocean fisheries, including the salmon fishery, pursuant to regulations promulgated by the Secretary of Commerce ("Secretary"). This regulation and management is to be conducted pursuant to several national standards set forth in the Act. See 16 U.S.C. §1851.

In 1980, the Secretary regulated the ocean fishery with an intent to provide sufficient returning salmon to Washington coastal streams to allow an Indian treaty

harvest of at least 50% of the harvestable numbers of each species on a Washington north coastal regional basis.[3] In 1981, the Secretary again promulgated regulations intended to provide the Washington coastal tribes with a harvest of at least 50% of each species, but not necessarily 50% of every run.[4]

Invoking the FCMA's right to review

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[3]The harvest statistics presented by the Secretary indicate that the actual harvest levels in 1980 provided the tribes with approximately 62% of the harvestable numbers and weight of the salmon runs which would otherwise have returned to the tribes' usual and accustomed places of fishing and at least 50% of each salmon species. While it is true that, in 1980, the plaintiff tribes did not harvest 50% of every run in every river, each tribe did harvest at least 60% of the salmon returning to the river systems in which it normally fishes. These harvest levels do not include consideration of steelhead trout, which are also subject to the treaty right, and which were harvested in numbers far in excess of 60% by each of the tribes involved.

[4]While final comparisons of treaty Indian and non-Indians harvest statistics are not available to the petitioner, the effect of the 1981 regulations predicted by the Secretary was to provide 61% of the salmon harvest to the treaty tribes. Steelhead trout harvest would be even more heavily weighted toward the tribes.

provision, 16 U.S.C. §1855, the tribes filed this legal challenge to the Secretary's action in Federal District Court in at the Western District of Washington on June 22, 1981. The tribes contended that, irrespective of various provisions of the FCMA which the Association believes are totally inconsistent with such approach, the cases of U.S. v. Washington, 384 F. Supp. 312 (W. D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied 423 U.S. 1086 (1976) and Washington et al. v. Washington State Commercial Passenger Fishing Vessel Association ("Fishing Vessel"), 443 U.S. 658, 99 S. Ct. 3055, 61 L.Ed.2d 823 (1979) require that the tribes be allowed to harvest at least 50% of each and every run subject to the Indian treaty fishing right even if this results in an overall non-Indian harvest of much less than 50% and large transfers of harvest to the Canadian fishery. Seeking to force the Secretary to base his regulation on

a strict river-by-river, run-by-run allocation system, the plaintiff tribes sought alternative relief of either reducing the 1981 ocean coho harvest quota from 620,000 to 260,000 fish in order to meet this goal[5] or substantially reducing the prescribed, in-stream escapement levels.[6]

Both of these alternative forms of requested relief would have substantial negative impacts on the Association. The Association's economic status was already in a severely depressed condition.[7] Had the

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[5]This reduction of 360,000 in the ocean coho harvest was the reduction necessary to provide a 50% treaty Indian harvest on the weakest coastal coho run. It would have resulted in approximately 1,150 additional coho returning to the Hoh River and an even greater share (than 61%) overall treaty Indian harvest on the aggregate of runs subject to the treaty right. The reduction would also have resulted in a transfer of harvest to the Canadian fishery of many tens of thousands of harvestable salmon, a result totally contrary to the "optimum yield" preeminent standard of the FCMA.

[6]Numbers of fish to be left unharvested to provide the necessary spawning levels to preserve and maintain each run.

[7]Since federal regulation began pursuant to the FCMA, the severe harvest quotas imposed by the Secretary on non-Indian

ocean quota reduction sought by the tribes been granted it would have required immediate cessation of the recreational fishery off the coast of Washington and a reduction in the sports harvest to less than 20% of the pre-FCMA levels.[8] The alternative requested relief, that of reducing escapement levels, was ultimately adopted for 1981 by the trial

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fishermen off the coast of Washington have resulted in a decrease of over 50% in angler effort levels compared to those experienced prior to federal regulation. Harvest levels also have steadily declined to a 1981 level of approximately 60% below those experienced in the 1971 through 1975 preregulation period. Since the Association's income is directly related to angler participation levels, the industry has experienced a tremendous decline in income at the same time it has experienced a tremendous increase in operating costs. Due to these effects, approximately 50% of the recreational charterboat fleet has gone out of business and many more are so threatened. These very serious impacts on the Association have similarly been felt by the non-Indian commercial fishermen off the coast of Washington. The combined effect on these two industries has resulted in very serious economic and social impacts on the coastal communities of Washington dependent upon such industries.

[8]As set forth in the affidavits accompanying the Association's Motion to Intervene, such relief would have ended the recreational ocean salmon fishery as it exists in the state of Washington.

court. This also seriously affects the Association as reduced escapement directly impacts future harvest levels, especially since the reduction in escapements occurred with respect to runs which were in a comparatively depressed state.

Because of the vital importance of this case to the economic well-being of its members, the Association sought intervention on July 9, 1981, upon learning that the United States would be taking a legal position very similar to the tribes'. On July 10, 1981, the Association also filed its own action for review of the Secretary's regulations under 16 U.S.C. §1855 and attempted to consolidate the two cases for the expedited hearing that had been granted the Hoh case by Judge Craig. After strong opposition to the Association's intervention by the plaintiff tribes, Judge Craig denied both the intervention (Appendix, p. 4) and consolidation

motions on July 25, 1981 and July 29, 1981 respectively.[9] The Association sought a stay of the trial, scheduled for August 3, 1981, pending an expedited appeal of denial of these motions. The stay was denied by Judge Farris of the Ninth Circuit on July 31, 1981. On August 3, 1981 Judge Craig heard the arguments on the parties in the Hoh case and rendered an oral opinion that same day.

The Association filed its appeal of denial of intervention with the Ninth Circuit on July 30, 1981. The Association's motion to expedite hearing on the appeal was granted (after opposition by the plaintiff tribes) with oral hearing on January 6, 1982. The Ninth Circuit rendered its decision affirming the trial court on March 15, 1982. (Appendix, p. 1 and p. 5). The Association

[9]A motion to intervene on behalf of the State of Washington Department of Fisheries was also denied. On a renewed motion the day of trial, the Department was granted limited intervention since the tribes had recognized the need to have jurisdiction over the state to effect their requested relief, and had thus dropped their opposition to the intervention as limited by the court.

moved for rehearing en banc on March 29, 1982, which motion was denied on May 5, 1982. (Appendix, p. 7).

Not only did the denial of intervention to the Association prevent its views from being heard with respect to the 1981 regulations,[10] but it continues to prejudice the Association with respect to the 1982 and future seasons. Judge Craig has retained jurisdiction in this case in order to establish a long-term salmon management plan. He has ordered negotiations between the existing parties to work out the format by which future regulations can be governed.

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[10]After intervention and consolidation were denied, the only avenue left to the Association was to independently pursue the separate case it had filed. While the United States agreed to expedite the case below, which went to trial without the Secretary even submitting an answer, it would not do so with respect to the Association's case and its motion seeking an extension of time in which to answer (until after the 1981 season was over) was granted. Thus, the non-Indian fishermen whose very livelihood was being litigated were completely barred from participation in the litigation, in time to affect the 1981 season.

The failure of the Association to gain intervention thus precludes its participation in developing the regulations that will govern its fishery in future years. Not only is this also totally inconsistent with the standards relating to intervention, but it effectively bypasses the regulatory process required by the FCMA and thus effectively precludes the Association's statutory right to review of the Secretary's regulations.

ARGUMENT

I. The Ninth Circuit Improperly Relied on its View of the Merits of the Case in Ruling on the Trial Court's Denial of the Association's Application for Intervention.

A. A court must not look to the merits of a controversy in determining a motion to intervene under Rule 24(a) of the Federal Rules of Civil Procedure.

A review of the Ninth Circuit's memorandum opinion in this case (Appendix, p. 1) clearly indicates its decision was based on its view of the

Association's position on the merits of the case below. The court stated that "the arguments that the Association sought to interject into this action by way of intervention have been foreclosed by the line of decisions . . ." and described the Association's attempt at intervention as a "thinly veiled effort by the Association to relitigate issues that have previously been decided . . ." While the Association strongly disagrees with this view of its legal position on the issues presented by the case below, Civil Rule 24(a), and the case law interpreting that rule, clearly indicate that a court's view of the Association's position on the merits is not properly considered in a ruling on a motion to intervene or review thereof.

The fact that the Ninth Circuit based its decision on its view of the merits of the Association's legal position creates a definite and important conflict

with the decisions of other circuit courts of appeals. It also is such a departure from well-established principles governing a party's right to intervene, and thus a party's right to access to the courts of the United States, as to call for an exercise of the Supreme Court's power of supervision as set forth in Rule 17 of the Supreme Court rules. The decision of the Ninth Circuit in rejecting the appeal of the Association, makes no mention of any failure on the part of the Association to comply with all the requirements of Rule 24(a) of the Federal Rules of Civil Procedure. Instead, the Ninth Circuit has constructed a new, and improper, requirement for intervention as of right.

The reasons cited by the Ninth Circuit in rejecting the Association's appeal constitute matters of defense. Issues which constitute defenses are not properly considered with respect to a motion to intervene. Kozak v. Wells, 278 F.2d 104, 109 (8th

Cir. 1960); Clark v. Sandusky, 205 F.2d 915, 918 (7th Cir. 1953). When considering a motion to intervene as a matter of right, all well pleaded allegations by the party moving for intervention are to be accepted as true. Central States v. Old Security Life Insurance Company, 600 F.2d 671, 679 (7th Cir. 1979); Stadin v. Union Electric Company, 309 F.2d 912 (8th Cir. 1962), cert. denied, 373 U.S. 915 (1963); Kozak v. Wells, supra. Thus, the question on the petition to intervene is whether a well pleaded claim is asserted; its merits are not to be determined. Clark v. Sandusky, supra at 918. As set forth above, Rule 24(a) also contains no requirements as to the merits of the position of an applicant for intervention. Not even the previous decisions of the Ninth Circuit have seen fit to require anything other than the four basic requirements of Rule 24(a). See, County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980); Blake v. Pallan,

554 F.2d 947, 951 (9th Cir. 1977); Stockton v. United States, 493 F.2d 1021, 1022-3 (9th Cir. 1974).

A requirement that the court find meritorious the contentions of the applicants in intervention prior to granting intervention would be totally unworkable and deny parties their right to access to the courts of the United States. Implicit in the position taken by the Ninth Circuit in this case is a requirement that a court somehow determine all the legal arguments of an applicant in intervention prior to determining whether that applicant can participate in the litigation before it. There is simply no pre-intervention process to make such determination. To the contrary, there are well settled and appropriate methods for dismissing parties' claims which are non-meritorious by means of various well defined procedures and motions.

The Ninth Circuit's new

requirement for intervention ignores the fact that intervention may be important just for the purpose of being in a lawsuit to protect one's interests as the lawsuit develops. Requiring an applicant in intervention to demonstrate the merits of its position even prior to the full development of the issues in a case presents an insurmountable barrier to intervention as of right which is inconsistent with fundamental concepts of due process and fair play.

The Ninth Circuit's holding also ignores the right of a litigant to seek reconsideration of prior rulings if new factual and legal considerations justify the same. Commissioner v. Sunnen, 333 U.S. 591, 599 (1948); Western Oil and Gas Ass'n v. EPA, 633 F.2d 803, 809 (9th Cir. 1980). A review of U.S. v. Washington, supra, clearly shows the court was dealing with a factual situation quite different from the mixed-stock ocean fishery when trying to determine

the appropriate allocation format to satisfy the tribes' right to a fair share of the resource. Certainly the enactment of the FCMA has injected new legal considerations into the controversy insofar as the ocean fishery is concerned. The Association believes that new factual and legal considerations arising since the enactment of the FCMA would require a reconsideration of the U.S. v. Washington decision if it otherwise applies to the ocean salmon fishery as the plaintiff tribes suggest. The denial of intervention has prevented the Association from making these arguments and proposing other allocation formats which could still meet the treaty's "fair share" requirement by providing the tribes 50% of the resource, but do so without causing the major violations of the FCMA, and disruptions in the non-Indian fishery, inherent in the tribes' approach.

The instant case provides a good example of the dangers associated with

the Ninth Circuit's approach. It is difficult to understand how the Ninth Circuit could have reached the conclusion that the Association's arguments were merely "thinly veiled efforts" to relitigate issues conclusively decided by prior cases when the court had never had an opportunity to review in any detail the legal arguments that the Association would raise should it be allowed to participate in the litigation below. The Court's mistaken conclusion that the Association merely seeks to relitigate well-decided issues may well be due to the fact that the tribes' position on the merits, which was essentially adopted by this Ninth Circuit decision, was fully set forth in the tribes' trial memorandum (part of the designated record to the Ninth Circuit). The tribes also, inappropriately, provided arguments on the merits of the case below as the main portion of their brief in the Association's appeal on intervention. In

contrast, the Association had no opportunity to present a trial memorandum on the merits and, due to the fact that it is inappropriate to consider the merits of the case when ruling on a right to intervene, only briefly discussed the merits of the case below in footnotes to its Ninth Circuit reply brief. Thus, even though the Association had no real opportunity to present its legal position to the court, the court dismissed its intervention on the basis that its legal position was non-meritorious.

B. Prior decisions have not conclusively determined the issues sought to be raised by the Association.

The Ninth Circuit's conclusion that the Association's position was merely a thinly veiled attempt to relitigate the issues of U.S. v. Washington and its progeny is vigorously disputed by the Association. The case below not only involves the Indian treaty right issues, but

also necessarily involves questions concerning how such treaty rights relate to the statutory standards under which the Secretary of Commerce is required to regulate the ocean fisheries pursuant to the FCMA. This act was not even adopted when U.S. v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), was decided. The Ninth Circuit further relied on this Court's opinion in Fishing Vessel, supra, to reach this conclusion regarding the merits of the controversy. Fishing Vessel only contains one limited reference to the relationship between Indian treaty rights and the federal obligations under the FCMA. 443 U.S. at 688. There is absolutely no discussion in any of this case precedent as to what management measures must be implemented in order to ensure that the requirements of both the Indian treaty rights and the FCMA could be met in regulating the ocean salmon fishery.[11] There are simply no forums

[11] For example, the primary requirement of the FCMA is that the fishery be managed to produce optimum yield. 16 U.S.C. §1851(a)(1). Which allocation system is cho-

sen for the ocean salmon fishery off the coast of Washington is extremely critical as to whether this statutory requirement for optimum yield can be met. While U.S. v. Washington dealt only with terminal area fisheries in Washington territorial waters where salmon stocks are largely susceptible to a "targeted" fishery due to their natural separation near their spawning rivers, the ocean fishery is a mixed-stock fishery where "targeting" harvest on separate runs is not possible. Thus, unlike terminal area fisheries, managing the ocean fishery to leave 50% of every run to return to the terminal area Indian net fisheries would require the limitation of the overall ocean harvest to only 50% of the weakest run in the mixed-stock ocean fishery. This causes massive reductions in ocean harvest to provide minimal increases in the terminal Indian treaty fishery on the weak run (and an excess Indian fishery on all other runs). The reduced ocean harvest, in turn, causes large transfers of harvest to the Canadian fisheries contrary to the Act's optimum yield requirements. If an allocation format which provides each tribe with an overall harvest of 50% were adopted by the Secretary, as suggested by the Association, the tremendous reduction in ocean harvest of stronger runs and transfer of harvest to foreign fisheries could be avoided. This would be accomplished by providing the tribes more than 50% harvest on some runs and less than 50% on others. The "fair share" principle of Fishing Vessel could thus be met for each tribe without violating the FCMA.

Furthermore, contrary to the apparent understanding of the Ninth Circuit, this type of flexibility in deviating from a strict equal sharing of each run has been approved by the court in U.S. v. Washington. For example, Judge Boldt has recognized the need to aggregate runs from more than one

in which such questions have been previously litigated[12] and thus the Association's efforts to have a court consider the relationship between Indian treaty rights and the FCMA are certainly not "a thinly veiled effort to relitigate prior decisions."[13]

The impropriety of

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river system to accomplish an equitable sharing even in the more easily managed territorial water situation. See, e.g., 459 F. Supp. at 1070.

[12]For example, no court has yet considered whether a river-by-river, run-by-run management format for the ocean fishery as required by the court below, violates the requirement of Fishing Vessel, supra, that the non-Indian harvest must be at least 50%. Due to the mixed-stock nature of the ocean salmon fishery and the practical and/or legal impossibility of non-Indian terminal fisheries on the Washington coast, river-by-river, run-by-run allocation as applied to the ocean harvest, guarantees that the non-Indian harvest of coastal stocks will be less than 50%. Since ocean harvest is limited to 50% of the weakest stock, by definition harvest of all other runs is at levels below 50%.

[13]In fact, the United States has, in pleadings in the Association's case, admitted that "the theory embraced by the Charterboat Association has never been squarely adjudicated." It is also worthy of note, that the United States has not opposed the Association's intervention in the case below.

applying this "thinly veiled effort" approach to disposing of the Association's appeal of its denial of intervention can also be seen by review of the position of the parties which were allowed to litigate in the case below. Obviously, the plaintiff tribes and the United States did not feel that all the pertinent issues surrounding the relationship between regulation pursuant to the FCMA and the Indian treaty fishing rights had been resolved or the case would not have been brought by the tribes in the first instance. If the Association, which as a user group is granted a right to appeal from federal regulations adopted by the Secretary (16 U.S.C. §1855(d)) is only attempting to resolve issues which "have been foreclosed by the line of decisions" beginning with U.S. v. Washington as suggested by the Ninth Circuit, then either the tribes or the United States were doing the same. However, no one would suggest that the tribes and the United States

did not have a right to access to the courts to litigate that issue. In light of the Association's direct economic and social interest, its right to access should not be distinguished from that of the existing parties.

C. The Association has a right to participate in the litigation below to protect its economic interests independent of its position on the merits.

Even if the Association's position on the merits was incorrect or non-meritorious as the Ninth Circuit has assumed, due process considerations would still require the allowance of intervention in order to protect the social and economic interests at stake in litigation challenging government regulation directly applicable to the Association and its sports fishery. There can be no question that the economic interests of the Association are substantially affected by litigation the purpose of

which is to determine appropriate ocean fishery management regulations. Since any changes in such regulations directly impact the Association, it should have the opportunity, pursuant to Civil Rule 24(a), to participate in any litigation challenging the propriety of such regulation and respond to arguments raised by other parties so long as the Association meets the requirements of Civil Rule 24(a).

There is certainly no way that the district court or Ninth Circuit could conclude that occasions would not arise during the litigation below where it would have been in the best interests of the Association to have representation and make its position known to the trial court. The Association had no opportunity whatsoever to present its position on any issue that was discussed during the trial in this matter, many or all of which could, and did, severely affect its economic interests. Without an

actual opportunity to participate, the Association has therefore been denied the protections provided by Civil Rule 24(a) irrespective of whether its position on some issues would have been deemed meritorious or not.

A striking example of how the Ninth Circuit's new requirement for intervention works to the improper detriment of potential intervenors is presented by this case. As part of its order in this case, the district court required the parties to negotiate future ocean salmon management guidelines. Such guidelines will determine future salmon management regulations promulgated by the Secretary, and will directly and substantially impact the economic and other interests of the Association. However, because its intervention was denied, the Association has had no voice in negotiating such regulations, or in telling the trial court why such negotiated regulations should

or should not be approved. It has simply been cut out of the process and has been left no recourse under which to protect its rights.[14]

II. The Association Qualifies for Intervention As of Right Under Rule 24(a) of the Federal Rules of Civil Procedure.

This case presents a situation in which the Association, and all the non-Indian sports fishermen it represents, have been denied meaningful access to the courts of the United States and presents a classic example of the type of situation intended to be covered by Rule 24(a) of the Federal Rules of Civil Procedure regarding intervention as a matter of right. In this case, the relief requested by the coastal tribes had, and still has, a very direct and substantial impact upon the Association, its

[14]The Association's right to judicial review under 16 U.S.C. §1855 has, in essence, been extinguished by this denial of intervention since it is the trial court, exercising its continuing jurisdiction, that is in actuality determining the future management regulations for the ocean salmon fishery.

members, tens of thousands of sports fishermen, and the coastal communities dependent thereon.

A review of Rule 24(a) of the Federal Rules of Civil Procedure indicates a clear, four-part test for intervention:

(1) timely application to intervene;

(2) that the applicant claims an interest relating to the property or transaction which is the subject of the action;

(3) that the applicant is situated so that disposition of the action may as a practical matter impair or impede his ability to protect that interest; and

(4) that the applicant's interest is not adequately represented by existing parties.

All of these requirements were clearly met by the Association in the case below.

A. The appellant sought intervention in a timely fashion.

There is no question but that the Association sought intervention in a timely fashion so as to meet the requirements of Rule 24(a). The appellant filed its Motion for Intervention shortly after learning that an action had been filed which could substantially affect its interest. The suit had just begun when the motion was filed. Indeed, the motion was filed within about two and a half weeks of the filing of the complaint, and substantially prior to the time the defendant's answer was due even under the expedited response schedule proposed by the plaintiffs. In light of the careful preparation required for this motion and supporting papers, as well as a need to determine the position of the parties, it is hard to imagine a motion being made much sooner than that made by the Association in this case.

B. The Association has a substantial interest in the subject matter of this action.

In this action, the plaintiff tribes sought to have the ocean coho salmon fishery managed on a river-by-river, run-by-run basis. As set forth in their complaint, the plaintiffs readily admitted that the effect of such a management scheme, given current escapement levels, would be to reduce the number of coho caught in the ocean by non-Indians by almost two-thirds when compared with the format proposed by the Secretary. Without doubt, such a management scheme would have a devastating economic effect on the members of the Association and the affidavits submitted by the Association so stated.

It is well established that economic interests of a party are sufficient to meet the interest required for intervention as of right. County of Fresno

v. Andrus, 622 F.2d 436 (9th Cir. 1980); Natural Resources Defense Council v. U. S. Nuclear Regulatory Commission, 578 F.2d 1341 (10th Cir. 1978); Natural Resources Defense Council v. Costle, 561 F.2d 904 (D. C. Cir. 1977).

Furthermore, the Association has much more than an economic stake in the outcome of this litigation. Its members are threatened with the loss of a way of life of great personal value should the plaintiffs position ultimately prevail. These social interests and the interest of preserving recreational fishing have been explicitly recognized in the FCMA and are also sufficient to establish the requisite substantial interest in the outcome of the litigation.

C. The Association is so situated that disposition of the underlying action will impair and impede its ability to protect its interest.

The plaintiffs in this action sought to determine how the Secretary of Commerce was to manage the ocean salmon fishery. The management scheme used by the Secretary with regard to the ocean salmon fishery has, and will continue to substantially impact the ability of the Association's members to fish, and thus to maintain their economic interest. As set forth above, the trial court's ruling regarding the 1981 regulations could have immediately terminated fishing by the Association's members, and has, by reducing escapement levels, affected the Association's future fishery. The District Court's ruling that the Secretary is required to apply a river-by-river, run-by-run management format could also preclude the petitioner from suc-

cessfully arguing in any other forum, including before the Pacific Fishery Management Council and the Secretary (who have responsibility for setting the ocean regulations) that a different format should be used.[15]

The impairment of the Association's ability to protect its interests is also clearly demonstrated by its inability to participate in the negotiations ordered by the trial court to work out guidelines with which future management regulations must comply. Since these future regulations will directly control the Association's future fishing opportunities, the Association's inability to participate in such negotiations is a severe impairment of its ability to protect its interests.

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[15]This impairment of the Association's ability to protect its interest has already been demonstrated in the 1982 season where, despite the Association's testimony and comments to the contrary, the Secretary has adopted regulations consistent with the dictates of the decision in this case.

D. Petitioner's interests are not adequately represented by existing parties.

At the time intervention was denied to the Association, the only parties to this action were the United States and the three coastal Indian tribes. It is clear from the positions taken by these parties in this litigation that they did not, and do not, adequately represent the position of the Association.

The requirement of inadequate representation is met "if the applicant shows that representation of his interest may be inadequate; and the burden of making that showing is minimal." Trbovich v. UMW, 404 U.S. 528, 538, f.n. 10 (1972) (emphasis added). Pursuant to the Trbovich standard, the Ninth Circuit has adopted a three-part test in determining whether present parties will adequately represent a prospective intervenor's interest. County of Fresno v.

Andrus, 622 F.2d 436 (9th Cir. 1980). A party's interest will be adequately protected only if all three of the following occur:

> (1) the interests of a present party to the suit are such that it will undoubtedly make all of the intervenor's arguments;
> (2) the present party is capable of and willing to make such arguments; and
> (3) the intervenor would not offer any necessary element to the proceedings that the other parties would neglect.

622 F.2d at 438-9. None of these criteria have been met. The Association had very substantial differences with the "agreed facts" submitted by the parties. The United States failed to make any of the major arguments which the Association deems necessary to an adequate consideration of the relationship between the FCMA and the Indian treaty rights.[16] The failure of the existing defendants to make the arguments that would be offered by the Association also means the

[16]It should be noted that the defendant United States is also a trustee of the plaintiff tribes, and therefore is necessarily restricted in the arguments it can make.

second test has not been met. Present parties obviously can not be deemed willing to make the arguments the petitioner would make if they did not do so at trial.[17] Finally, the appellant believes it offers a necessary element to the proceedings which the other parties will neglect. As has been noted by the 10th Circuit Court of Appeals, "on its face" it is "impossible" for the government to adequately protect the "private interests" of business and the "interest of the public" in the same action. National Farm Lines v. ICC, 564 F.2d 381, 383 (10th Cir. 1977). See also, New York Public Interest Research Group v. Regents of the State of New York, 516 F.2d 350, 352 (2d Cir. 1975); Natural Resources Defense Council v. Costle, supra.

[17] In County of Fresno, supra, the Ninth Circuit found this requirement to be met solely on the basis of a party's unwillingness to appeal an issue the potential intervenor would have appealed, even though both the party and potential intervenor had "virtually identical" arguments on the merits of the controversy. 622 F.2d at 439.

CONCLUSION

The Washington State Charterboat Association met all of the legal requirements for intervention as of right in the case below. Its intervention was denied by the trial court, as was the Association's attempt to gain timely review of the ocean management regulations applicable to it pursuant to a motion to transfer and consolidate its own action with the case below. Now the trial court retains jurisdiction in this case and is utilizing that retained jurisdiction to develop a management program which will govern the ocean salmon fishery for years to come. This development is proceeding without any ability of the Association to participate or affect the outcome.

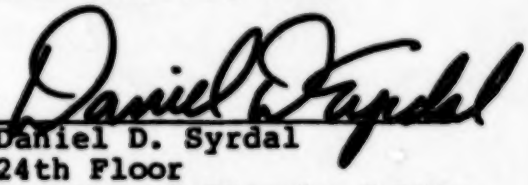
On review, the Ninth Circuit upheld the trial court's denial of intervention based on an inappropriate and irrelevant conclusion that the Association's case on the merits of the controversy was non-

meritorious. If this petition is denied, therefore, the Association will have been denied access to the courts of the United States with respect to issues the outcome of which has already seriously harmed the Association and which could determine its members' very survival as an industry. The tribes and the United States will have been allowed to determine the economic future of the Association, and the future of the ocean recreational fishery and many coastal communities dependent upon it. Not only is such a result totally foreign to established concepts of due process and fair play, and contrary to the statutory right of review of the Secretary's regulations under the FCMA,

but it represents the very result that Rule 24(a) was designed to prevent.

Respectfully submitted,

CARMODY, SYRDAL,
DANELO & KLEIN, P.S.

By 

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